

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD ABBOTT

v.

UNITED STATES OF AMERICA

CIVIL ACTION

NO. 98-1449

CRIMINAL ACTION

NO. 93-009-05

MEMORANDUM

Broderick, J.

April 29, 1998

Petitioner Edward Abbott has filed a pro se motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Abbott filed the motion on March 19, 1998, approximately three and one-half years after his judgment of conviction and sentence was affirmed by the United States Court of Appeals for the Third Circuit. For the reasons set forth below, the motion will be dismissed for failure to file within the one year period of limitation imposed by Section 105 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1220 (codified at 28 U.S.C. § 2255).

**I. BACKGROUND**

On January 6, 1993, a grand jury returned an eleven count indictment against Edward Abbott and co-defendants Thommie Hampton, Kenneth Hampton, Eric Hampton, Edward Hampton, and Darryl Kates. The indictment alleged that the defendants were members of a drug organization called "Hamp's Nation" which sold

kilogram quantities of cocaine and cocaine base (crack) in West Philadelphia between 1989 and 1992. Abbott was charged in three of the eleven counts with conspiracy to distribute more than fifty grams of cocaine base (crack) and more than five kilograms of cocaine in violation of 21 U.S.C. § 846 (Count I), distribution of and aiding and abetting the distribution of more than five grams of cocaine base (crack) in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (Count VIII), and criminal forfeiture pursuant to 21 U.S.C. § 853 (Count XI).

On July 20, 1993, Abbott pled guilty to all three counts charged against him in the indictment. On October 19, 1993, the Court sentenced him to 360 months imprisonment with a ten year term of supervised release. This judgment of conviction and sentence was affirmed by the Third Circuit on September 16, 1994, and the circuit court's mandate issued on October 11, 1994 (Docket No. 93-2028). Then, on March 1, 1996, Abbott filed a pro se motion pursuant to 18 U.S.C. § 3582(c)(2) and United States Sentencing Guideline § 1B1.10 for reduction of sentence based on Guideline Amendment 505 concerning reduction of the upper limit of the drug quantity table. After holding a hearing on June 25, 1996, the Court granted Abbott's motion and resentenced him to 276 months imprisonment. The sentence was affirmed by the Third Circuit on April 29, 1997 and the circuit court's mandate issued on May 21, 1997 (Docket No. 96-1576).

Abbott filed the instant § 2255 motion on March 19, 1998 alleging three claims. First, Abbott contends that his guilty

plea was unlawfully induced and not made with a clear understanding of the consequences. Second, he contends that his sentence was improperly enhanced for criminal conduct completed before the Sentencing Guidelines were enacted and that the Court failed to consider any possible downward departures for his role in the criminal conspiracy. Finally, Abbott contends that his counsel was constitutionally ineffective at sentencing for failing to object or urge the Court to consider the claims detailed above.

## **II. DISCUSSION**

Rule 8(a) of the Rules Governing Section 2255 proceedings provides that the Court shall determine whether an evidentiary hearing is required for the disposition of a § 2255 petition. The Court has examined the record in this case and has determined that an evidentiary hearing is not required in view of the fact that all of petitioner's claims can be properly disposed of on the basis of the record. Government of the Virgin Islands v. Bradshaw, 726 F.2d 115, 117 (3d Cir. 1984), as modified by United States v. Dawson, 857 F.2d 923, 927 (3d Cir. 1988).

Section 105 of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1220 (effective April 24, 1996) amended 28 U.S.C. § 2255 to provide a one year limitation period in which to file § 2255 motions. Section 2255 now provides:

A 1-year period of limitation shall apply to a motion

under this section. The limitation period shall run from the latest of--

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

The AEDPA is silent concerning the applicability of this one year limitation period to motions challenging criminal convictions which became final prior to the Act's enactment. In Burns v. Morton, 134 F.3d 109, 111-12 (3d Cir. 1998), the Third Circuit ruled that federal prisoners whose convictions became final prior to the enactment of the AEDPA are entitled to one full year from the effective date of the AEDPA to file § 2255 motions. Thus, "§ 2255 motions filed on or before April 23, 1997, may not be dismissed for failure to comply with § 2255's one-year period of limitation." Id. at 112. However, § 2255 motions filed on or after April 24, 1997 are subject to the one year limitation.

Abbott's motion is clearly barred by § 2255's one year limitation provision. Abbott's conviction became final on October 11, 1994, the date on which the Third Circuit issued its mandate affirming this Court's judgment of conviction and sentence. His § 2255 motion was filed more than three years

thereafter, on March 19, 1998. None of the provisions in the revised § 2255 which would delay the one year limitation period apply in the instant case.

Moreover, the date on which Abbott's conviction became final and triggered the one year limitation period is not altered by this Court's resentencing of Abbott following his motion to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(2) and United States Sentencing Guideline § 1B1.10. The law is clear that a modification of sentence pursuant to 18 U.S.C. § 3582(c) does not effect the finality of judgment:

Notwithstanding the fact that a sentence to imprisonment can subsequently be -- (1) modified pursuant to the provisions of subsection (c); (2) corrected pursuant to the provisions of Rule 35 of the Federal Rules of Criminal Procedure and section 3742; or (3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742; a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

18 U.S.C. 3582(b). Accordingly, Abbott's pro se motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (Document No. 320) will be dismissed for failure to comply with the one year limitation period imposed by Section 105 of the AEDPA.

Finally, even if the Court were to address Abbott's motion on the merits, the motion would be denied. Abbott's first two claims concerning his plea and sentence were addressed and rejected on the merits by the Third Circuit in its unpublished opinion of September 16, 1994, affirming his judgment of

conviction and sentence. They may not be raised again on collateral review. United States v. Palumbo, 608 F.2d 529, 533 (3d Cir. 1979). Furthermore, to the extent that these two claims may be different from his claims raised on direct appeal, Abbott's failure to raise them on direct appeal waives his right to raise them now absent a showing of cause and prejudice, which is lacking here. United States v. Essiq, 10 F.3d 968, 979 (3d Cir. 1993). Abbott's third claim for ineffectiveness of counsel would also be denied, as he fails to satisfy either part of the standard enunciated by Strickland v. Washington, 466 U.S. 668 (1984).

### **III. CONCLUSION**

For the foregoing reasons, the petitioner's pro se motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 will be dismissed for failure to file within the one year period of limitation imposed by Section 105 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1220 (codified at 28 U.S.C. § 2255).

An appropriate Order follows.

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ORDER

AND NOW, this 29th day of April, 1998; for the reasons set forth in the Court's Memorandum of this date;

**IT IS ORDERED:** Petitioner Edward Abbott's pro se motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (Document No. 320) is **DISMISSED** for failure to file within the one year period of limitation imposed by Section 105 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1220 (codified at 28 U.S.C. § 2255).

**IT IS FURTHER ORDERED:** There are no grounds for issuing a certificate of appealability pursuant to 28 U.S.C. § 2253(c).

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RAYMOND J. BRODERICK, J.